PREME COURT, U. S.

APR 24 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1208

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

—against—

GENERAL ELECTRIC COMPANY,

Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID L. BENETAR
NORDLINGER, RIEGELMAN,
BENETAR & CHARNEY
Attorneys for
General Electric Company
420 Lexington Avenue
New York, New York 10017

DAVID L. BENETAR
THOMAS F. HILBERT, JR.
MICHAEL I. BERNSTEIN
of Counsel

INDEX

	PAGE
Question Presented	2
Statement of the Case	2
A. Approach of the Parties to Arbitration	2
B. Grievance N. D. 8290	3
1. The facts	3
2. The decision below	4
C. Grievances N. D. 8427 and N. D. 8643	6
1. The facts	6
2. The decision below	7
Reasons for Denying Writ	7
Conclusion	10

Table of Cases:

Carey v. General Electric Co., 315 F.2d 499 (2 Cir. 1963), *cert. denied* 377 U.S. 908 (1964)	2
Flintkote Co. v. Textile Workers Union, 243 F.Supp. 205 (D.C. N.J. 1965)	9
Independent Petroleum Workers of America v. American Oil Company, 324 F. 2d 903 (7 Cir. 1963), *aff'd* 379 U.S. 130 (1964)	9

PAGE

International Association of Machinists v. Cutler-Hammer, 271 App. Div. 917 (1st Dept. 1947), *aff'd* 297 N. Y. 519 (1947) 8, 9

International Union of Electrical, Radio & Machine Workers v. General Electric Co., 332 F.2d 485 (2 Cir. 1964), *cert. denied* 379 U.S. 928 2

Local 787, IUE v. Collins Radio Co., 317 F. 2d 214 5 Cir. 1963) 8

United Aircraft Corp. v. Lodge 971, IAM, 360 F. 2d 150 (5 Cir. 1966) 8

United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 2, 3, 7, 8

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 2, 3, 7

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 2, 3, 7

Wil-low Cafeteria, Inc., In Re, —— F.Supp. —— (S.D. N.Y. 1939), 4 LRRM 798, *aff'd* 117 F.2d 429 (2 Cir. 1940) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1208

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

—against—

GENERAL ELECTRIC COMPANY,

Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

General Electric Company (the "Company") respectfully submits this brief in opposition to the conditional cross-petition[1] filed by International Union of Electrical, Radio and Machine workers, AFL-CIO (the "Union"), for a writ of certiorari to the United States Court of Appeals for the Second Circuit for review of that portion of its judgment below, rendered and entered on December 27, 1968, deeming grievances N. D. 8290, N. D. 8427 and N. D. 8643 nonarbitrable.

---

[1] The cross-petition requests that the writ "issue only in the event that this Court should grant the [Company's pending] petition for a writ of certiorari in No. 1114" (Cross-Pet., p. 2).

Question Presented

The court below did not, as the question presented by the Union implies, disregard the *Steelworkers*[2] trilogy (Cross-Petition p. 2). To the contrary, as contended in the Company's petition for certiorari in No. 1114, the court below erroneously applied, in the manner indicated *infra*, pp. 7-10, the more liberal test of the *Steelworkers* principles. It did so in the face of contractual guidelines to the contrary. Even under the *Steelworkers* principles, however, grievances N.D. 8290, N.D. 8427 and N.D. 8643 are, as correctly held by the court below, nonarbitrable.

Statement of the Case

A. *Approach of the Parties to Arbitration*

The grievances in question arose under, and are governed by, the 1963 collective bargaining agreement between the parties.

The prior, or 1960, agreement between the parties contained what has since been characterized as the "standard" type of arbitration clause.[3] It was judicially construed[4] under the interpretative guidelines created in the *Steelworkers* trilogy.

---

[2] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[3] *International Union of Electrical, Radio & Machine Workers* v. *General Electric Co.*, 332 F.2d 485, 488 (2 Cir. 1964), *cert. denied* 379 U.S. 928; and see *Carey* v. *General Electric Co.*, 315 F. 2d 499 (2 Cir. 1963), *cert. denied* 377 U.S. 908 (1964).

[4] *Ibid.*

The language of the 1960 arbitration agreement was, in the words of the court below, "extensively revised" by the parties in their 1963 agreement (Pet., pp. 30-31). Yet, much of this revised language is bypassed without even mention by the Union either in its cross-petition or its brief in opposition to the Company's petition for certiorari. As acknowledged by the court below, however, the 1963 agreement is "obviously different" from both its predecessor agreement and the agreements at issue in the *Steelworkers* cases (Pet., pp. 30-31, 34). Thus, as stated by the court below:

> "Arbitration as of right is clearly limited to matters involving 'disciplinary action' and 'claimed violation of a specific provision' of the Agreement; an 'implied or assumed obligation' is specifically excluded from arbitration as a matter of right; 'violation of a specific provision' is further qualified as a 'direct violation of the express purpose of the contractual provision'; examples are given in an attempt to clarify the difference between an 'express' and an 'implied' purpose; a court is told that no matter is arbitrable unless it finds that the parties 'clearly agreed that the subject involved would be arbitrable in light of the principles of arbitrability set forth' in the contract; and finally, a court is instructed not to 'proceed under any presumption' of arbitrability." (Pet., pp. 34-35)

B. *Grievance N. D. 8290*

1. The facts

On Saturday, November 23, 1963, it was announced that the funeral of the late President John F. Kennedy would be held on November 25th. To permit observance of the funeral, the Company decided to grant an extra-contractual

partial holiday. Details and conditions were to be determined locally (A. 67).[5]

The Schenectady plant decided to permit observance during the hours of 11:30 A.M. and 2:00 P.M. The leave was to be with pay, provided the employees returned to work at 2:00 P.M. Employees not so returning would be ineligible for the holiday payment and would be paid, simply, for the number of hours worked that day (*ibid.*).

Arrangements were discussed with the Union on November 24th and 25th prior to implementation. The reaction was favorable. Details were announced to the employees on the morning of the 25th. Those wishing to avail themselves of the partial holiday were permitted to do so on the basis of the above-described conditions. Those electing not to return to work after 2:00 P.M. were deemed ineligible for the extra holiday payment. *Ibid.*

The Company's failure to grant holiday pay to those ineligible therefor is characterized by the Union, in N. D. 8290, as an unjust "disciplinary penalty," arbitrable under Article XV, Sections 1(b) and 6(a)(i) of the agreement. Further, the allowance for the two-hour mourning period is characterized as a unilateral change in the regular hours of work or working schedule, without at least one week's notice, in violation of Article V, Sections 1(a) and (c) of the agreement (A. 46).

2. The decision below

N. D. 8290 was deemed arbitrable by the district court, in part based upon a factual dispute as to whether or not the holiday was unilaterally imposed (A. 13-14). The Union,

[5] Reference is for "Appellant's Appendix," filed in the court below and with this Court in No. 1114.

in its cross-petition (p. 6), again alludes to this point. The court below, at the urging of the Company (A. 68), rejected this contention as immaterial to the Company's position; for even assuming, *arguendo,* unilateral declaration of the holiday, the provisions relied upon do not, on their face, govern the dispute.

Thus, Sections 1(a) and (c), Article V, define the *"regular"* workweek and its components. [Emphasis supplied.] They provide, in pertinent part, that variations in the regular hours of work or work schedules will be "subjects for local negotiations," requiring "at least one week['s] . . . advance" notice (A. 68, 78-79). The instant dispute involves only a non-recurring deviation in certain hours of a single workday, arising out of an unforeseen tragedy. On its face, it simply does not involve the establishment of or a variation in the regular hours of work or working schedule which the parties contemplated could be made with at least one week's advance notice.

As to the alleged "disciplinary" nature of the grievance, the majority of the court below agreed that no such question was involved (Pet., p. 53). The condition upon which hours not worked are to be compensated is plainly an *eligibility* requirement, not a matter of discipline. The Union, itself, by referring to the eligibility requirements for payment (A. 45), so characterized the dispute.[6]

---

[6] See, also, *In Re Wil-low Cafeterias, Inc.,* —— F.Supp. —— (S.D. N.Y. 1939), 4 LRRM 798, *aff'd* 117 F. 2d 429 (2 Cir. 1940), And note, in this regard, the failure of the Union in the instant case to deny (A. 68) that it has never characterized as disciplinary in nature an analogous provision of the contract which conditions holiday pay on attendance at scheduled work immediately after the holiday.

C. *Grievances N. D. 8427 and N. D. 8643*

1. The facts

Piece rate prices are classified, pursuant to Article VI, Section 4 of the agreement, as "Standard", "Temporary" or "Special" (A. 61, 80). Unlike the case of Temporary or Special prices, revisions in Standard prices must be predicated on corresponding changes in manufacturing method (*ibid.*).

The Pittsfield tap selector price, in 1953, was reclassified in local negotiations with the Union from a Standard to Special piece rate price. It has remained Special ever since, a fact which the Union does not dispute (A. 14-15, 61).[7] The Union contends, in N. D. 8427, that the rate now should be reclassified as Standard (A. 14-15, 50-52, 61).

The Pittsfield shear price, since introduced, has been classified as a Special piece rate price (A. 14-15, 29, 50-51, 61-62). The Union does not dispute this or the fact that, in 1963, the Company, on the basis of actual experience with the operation, substituted a different Special rate in lieu of the initial one (A. 15, 61-62). The replacement of the initial Special rate with the new Special rate is challenged, in N. D. 8643, as an unauthorized change because unaccompanied by a methods change (A. 15, 51, 62).

In each case, the Union's claim is predicated upon Article VI, Section 4 of the agreement.

---

[7] Also undisputed is the fact that many prices have remained Special or Temporary for extended periods of time due to a variety of reasons, the details of which are not here material (A. 61).

2. The decision below

Nowhere in the record did the Union assert that the existing prices were anything but, as alleged by the Company, Special. And, as pointed out by the court below, "the Union cites no specific language which even deals with restraints upon the Company in setting new Special piece prices or altering the method of manufacture on such jobs" (Pet., p. 39). In short, the Union failed to allege, as required by the agreement, a violation of a specific provision that expressly covers the "subject" of the grievance (*ibid.*). Accordingly, the grievances were deemed nonarbitrable.

Reasons for Denying Writ

The court below, contends the Union, disregarded the principles enunciated in the *Steelworkers* trilogy, thus posing an important federal question seriously affecting the "well-settled principles governing the critical aspect of arbitrability in national labor policy" (Cross-Pet., p. 12).

The Union's contention is erroneous. The court below did not disregard the principles enunciated in the trilogy. Indeed, it was the court's very application of the trilogy principles, in the face of contractual guidelines to the contrary, which led the Company to file its petition for certiorari in No. 1114. Thus, at the outset of its opinion, the court expressly described its task in terms of applying the subject contractual language *"within the framework of the broad federal principles of arbitrability enunciated in the Steelworkers trilogy"* (Pet., p. 28). [Emphasis supplied.][8]

[8] The court acknowledged certain of the differences (Pet. pp. 34-35) between the standard arbitrability language and that here in dispute. However, its decision as to the instant grievances was, even under the trilogy principles, correct and consonant therewith.

The Union argues to the contrary, contending, in N. D. 8290, that the court below resurrected the corpse of *International Association of Machinists* v. *Cutler-Hammer,* 271 App. Div. 917 (1st Dept. 1947), *aff'd* 297 N. Y. 519 (1947). This contention is predicated upon the erroneous assumption that, in making a determination as to arbitrability, a court is precluded from examining the nature of the claim —even where that examination is not to determine whether the claim is frivolous on its merits, but whether the subject matter of the claim is governed on its face by the provision relied upon. *United Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564.[9]

Absent such an examination, courts would be bound by a grievant's characterization of a dispute, however unfounded. Parties would be powerless to limit the scope of arbitrability—even where, as here, they expressly bargained for a judicial determination as to whether a provision of the agreement truly has been invoked. See *Local 787, IUE* v. *Collins Radio Co.,* 317 F. 2d 214 (5 Cir. 1963); *United Aircraft Corp.* v. *Lodge 971, IAM,* 360 F. 2d 150 (5 Cir. 1966). Indeed, in the context of N. D. 8290, virtually any company action could be subjected to arbitral review under the label "discipline" if the mere use of the label could preclude court examination as to the appropriateness of its use.

Even under the "standard" arbitration clause, this result would exceed the limits of the most liberal view of

---

[9] In the *Cutler-Hammer* case, the court did not confine itself to a determination as to whether the subject matter of the claim was governed on its face by the language of the agreement; rather, the court went further and, on the merits, ruled the grievance non-arbitrable.

the presumption of arbitrability; for, as noted in *Independent Petroleum Workers of America* v. *American Oil Company,* 324 F. 2d 903, 906-07 (7 Cir. 1963), *aff'd by an equally divided Court,* 379 U.S. 130 (1964), the mere assertion that the agreement has been violated does not, *ipso facto,* lead to a finding of arbitrability.[10] If a contract such as that at bar—with its requirement that there be a finding of a clear agreement to arbitrate—could be so ignored, it would, for all practical purposes, end the rule of voluntary resort to arbitration and in fact substitute compulsory arbitration in its place.

In N. D. 8427 and N. D. 8643, argues the Union, the court below has "attempted to state what the plain meaning of certain provisions were, without considering the express contractual definitions," *i.e.,* the court "accepted the Company's designation of a Special piece price on the two operations involved, but did not measure the nomenclature used against the contractual definition of Special piece price found in Article VI, 4(a)" (Cross-Pet., p. 11). This contention overlooks the fact that, as pointed out by the court below, *"it is uncontradicted that the rates here are Special"* (Pet., p. 39). [Emphasis supplied.] N. D. 8427 and N. D. 8643 do not entail a resurrection of the *Cutler-Hammer* doctrine; rather, they involve a simple failure

---

[10] See, also, *Flintkote Co.* v. *Textile Workers Union,* 243 F.Supp. 205 (D.C. N.J. 1965). And see the opinion below of Judge Feinberg who, though dissenting on this grievance, acknowledged (Pet., pp. 50-51):

> ". . . I do not suggest that the Union could compel arbitration of any conceivable grievance merely by labelling it 'disciplinary.' The court must be satisfied that the actions in question could possibly be so construed within a rational application of the phrase." [Footnotes omitted.]

to state or refute a material allegation essential to invocation of the provisions relied upon.[11]

Accordingly, it cannot be said, as contended by the Union, that the grievances here in dispute involve important questions of federal law calling for review by this court.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Dated: April 24, 1969

Respectfully submitted,

DAVID L. BENETAR
NORDLINGER, RIEGELMAN,
BENETAR & CHARNEY
Attorneys for
General Electric Company
420 Lexington Avenue
New York, New York 10017

DAVID L. BENETAR
THOMAS F. HILBERT, JR.
MICHAEL I. BERNSTEIN
of Counsel

---

[11] Were the rates in question alleged to be Standard, N. D. 8427 and N. D. 8643 would not, we submit, be arbitrable in any event. Like N. D. 9280 and N. D. 9349 (discussed in our petition for certiorari in No. 1114), these grievances would be excluded from arbitration under Article XV, Section 7(e) and related provisions of the agreement.